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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Petitioner,

v.

THE UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

REPLY BY PETITIONER WHITE MOUNTAIN APACHE TRIBE TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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INTRODUCTION

Error pervades all aspects of the brief filed by the United States in Opposition to the Petition for a Writ of Certiorari, filed here by the White Mountain Apache Tribe.

Contrary to Trustee's Contentions, the 16,000 Acres Here Involved Are and Have Always Been Within Tribe's Reservation

(1) To end the costly and protracted war with the Western Apaches, which includes the Petitioner Tribe, the United States Trustee, by the Executive Orders of November 9, 1871 and December 14, 1872, carved from Petitioner Tribe's ancient ancestral homeland the White Mountain Apache Indian Reservation. Among other things the United States, in establishing the boundaries of Petitioner Tribe's Reservation, designated "... the south edge of the Black Mesa" to be the Northern Boundary of Tribe's Reservation.[1]

(2) The Indian Claims Commission found as a fact:

> ... that May 1, 1873, marks the date on which the United States *took from the Western Apache Indians their Indian title to all of their aboriginal lands located outside of the boundaries of the reservation established by the Executive Orders of November 9, 1871 and December 14, 1872.*[2]

The Trustee's erroneous Wallace Survey was not conducted until 1887, fifteen years subsequent to the inclusion of the 16,000 acres of land within Tribe's Reservation.[3]

(3) Petitioner White Mountain Apache Tribe and the United States Trustee entered into the Compromise Settlement dated September 12, 1972.[4] They agreed that the

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[1] Petition, p. 6-9; Appendix p. 67a, 78a; Appendix 3, Affidavit of Elmer M. Clark, pgs. 8a-9a.

[2] Appendix 6, Indian Claims Decision, June 27, 1969, Finding No. 12, p. 75-a. (Emphasis supplied)

[3] *Ibid.*

[4] Petition, p. 11.

Trustee had taken "all" of Petitioner's Tribe's ". . . aboriginal lands located *outside of the boundaries of the Reservation established by the Executive Orders of November 9, 1871 and December 14, 1872,*"[5]

(4) The 16,000 acres were "*not outside*" of Tribe's Reservation when it was created.[6]

(5) Today, those 16,000 acres of Petitioner Tribe's lands are illegally occupied by agents of the United States Trustee[7] for the benefit of the Trustee to Petitioner Tribe's continuing irreparable damage.[8]

(6) The Court and lower courts have repeatedly declared that:

> The general rule, is that in matters of boundaries calls for natural objects and fixed monuments control those for distances.[9]

The Court and the lower courts have likewise repeatedly declared as a matter of law that:

> The United States 'could not . . . by an incorrect survey deprive the Indians of the right of occupation of

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[5] Petition, pgs. 8-9, 11; Appendix 5, p. 67, Executive Order of November 9, 1871; Appendix 7, p. 78-a, Executive Order of December 14, 1872; Appendix 6, p. 75-a, 21 Ind.Cl.Comm, 189 (1969), Finding 12. (Emphasis Supplied); *see* Petition, p. 11.

[6] Petition, p. 8-10.

[7] *Ibid.*

[8] Petition, pgs. 8, 9.

[9] Petition, p. 20; *see Sekaquaptewa v. McDonald*, 626 F.2nd 113, 118, (CA 9, 1980); *See* also *United States v. Romaine*, 255 F.253, 260 (CA 9, 1919); *United States v. Stotts*, 49 F.2d 619, 620 (U.S.D.C.W.D. Wash. 1930); *see* Vol. 6, Commentaries on the Modern Law of Real Property, p. 571, in which it is declared, Skec. 3044, "Superiority of Calls to Monuments . . . . A 'monument' is a tangible landmark, and monuments as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary. . . ." *See Tiffany, Law of Real Property*, 3rd Ed., p. 430, 514; Vol. 6, Thompson Real Property, p. 576.

the land within the legal boundaries of the Reservation.'[10]

Predicated upon those undenied and undeniable facts and controlling principles of law, Petitioner White Mountain Apache Tribe has repeatedly, without success, attempted to be heard by a court of competent jurisdiction with the objective of having the possession of the 16,000 acres restored to it.

ERRORS STRIP ALL MEANING FROM QUESTION NO. 1 PRESENTED IN TRUSTEE'S BRIEF IN OPPOSITION[11]

The inceptive error in Question No. 1 of the Brief in Opposition, which is quoted below, is the statement that the lands here involved—the 16,000 acres of land—were part of the aboriginal lands of Petitioner Tribe "lying outside of the boundaries" of Tribe's Reservation, title to which was in fact extinguished.[12] The 16,000 acres which Plaintiff Tribe seeks by these proceedings to recover are today "*within*" Tribe's Reservation.[13] The only lands, title to which was extinguished by the United States Trustee, were lands "*outside*" the boundaries of Tribe's Reservation when it was created in 1871.

Those agents of the Trustee are likewise fully aware of the controlling precepts of the law that an erroneous survey (1) cannot change a boundary that was created by a designated natural monument, as here, the south edge of the Black Mesa; and (2) that an erroneous survey will not deprive the Petitioner White Mountain Apache Tribe of

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[10] Petition, pgs. 21-22 and cited authorities; see also *Northern Pacific Ry. Co. v. United States*, 191 F. 947, 958 (1911); see also *Northern Pacific R.R. Co. v. United States*, 227 U.S. 355, 366 (1913).

[11] Brief of the United States and Opposition, p.1. Question No. 1. Whether the trial court abused its discretion in refusing to reopen a 15-year-old judgment that extinguished the petitioner Indian Tribe's aboriginal title to land lying outside of the boundaries of its Reservation?

[12] *Supra.*, pgs. 1-2, para. 1-5.

[13] *Ibid.*

its lands within the legal boundaries of its Reservation. It is on the background of those facts and principles of law that reference is now made to the other illogical arguments that the Trustee, not the Tribe, has title to the 16,000 acres.

PRINCIPLES OF COLLATERAL ESTOPPEL–PRECLUSION–HAVE NO APPLICATION HERE

Repeatedly, the Trustee United States has asserted in error that Petitioner Tribe had an opportunity to be heard respecting its title to the 16,000 acres. That statement is contrary to fact. Never at any time has the Tribe been permitted to establish the facts set forth in Tribe's Petition and in this Reply. The "trial court" simply refused to hear the Tribe's case, agreeing only to permit the Tribe to place into the record the affidavit of Tribe's Professional Surveyor.[14] The issue was explicitly presented to the Court of Appeals for the Federal Circuit in Petitioner Tribe's Brief and the arguments presented there were totally ignored by that Court except for its declaration that ". . . the government had persuasively explained" that the Tribe's claims to the 16,000 acres had been "resolved and subsumed" in other proceedings.[15] It is an incongruity for the Trustee to state that the matter was not presented to the Court below when that court declared the "government persuasively explained" [albeit in total error] that it [Tribe's claim] was resolved and subsumed in other proceedings."[16]

As reviewed and documented in both Tribe's Petition and in this Reply, title has always remained in Petitioner Tribe and the Tribe is entitled to be heard in a court of competent jurisdiction to refute the erroneous claims of

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[14] Appendix 3, p. 7a.

[15] Petition, p. 12-14.

[16] *Ibid.*, neither *Zobrest v. Catalina . . . School District*, 113 S.Ct. 2462 (1993); nor *Adickes v. Kress*, 398 U.S. 144 (1970), referring to a "general rule" have application here.

the agents of the Trustee which can only be accomplished by a mandate from this Court.[17]

The Trustee, repeating its grossly erroneous charges contained in its Question No. 1, makes this statement:

> The judgment in Docket No. 22-D extinguished any claim that petitioner had to the disputed 16,000 acres.[18]

It is impossible to perceive why the Trustee continues to deny the undeniable fact that the 16,000 acres[19] are south of the south edge of the Black Mesa within Tribe's Reservation.[20] The Trustee has taken cognizance of the fact that only the lands outside of Tribe's Reservation were extinguished. That concept arises from the fact that the Trustee now asserts that, in some fashion, the Tribe was deprived of its title by the case of *White Mountain Apache Tribe v. Clark.*[21] That conclusion respecting the Trustee's thinking is predicated upon a reference presented in the Brief in Opposition by way of a footnote. That statement, albeit cryptic, is quoted in full. "The litigation [sic] in the Ninth Circuit construed the 1972 consent judgment differently, however, and found that it had extinguished petitioner's claim to title."[22] To clarify that statement, reference is made to the nature and objective of Petitioner Tribe's case against the then Secretary of the Interior *Clark*—later *Hodel.* In that case the Tribe relied upon the hallmark decisions of *Land v. Dollar*[23] and *United States v. Lee.*[24] In *Land v. Dollar,* it was explained that the case

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[17] *Supra.*, p. 1-2, pp. 1-5.

[18] *Supra.*, pgs. 4-5.

[19] *Supra.*, pg. 3.

[20] *Ibid.,1-5.*

[21] 604 F. Supp. 185 (U.S.D.C.DK.Ariz. 1984); *White Mountain Apache Tribe v. Hodel,* 784 F.2nd 921, 922 *cert. den.* 479 U.S. 1006 (1986).

[22] Brief of the United States in Opposition, p. 9, para. 7.

[23] 330 U.S. 731, 736-738 (1947).

[24] 106 U.S. 196 (1882).

of *United States v. Lee* involved an action of ejectment to recover possession of a tract of land. That was precisely the objective of the case of *White Mountain Apache Tribe v. Clark.*

The Court, in *Land v. Dollar* emphasized that the action in *United States v. Lee* was not "an adjudication" that would be *res judicata* "against the United States because it cannot be made a party to the suit. . . ."[25] The Court then added ". . . that an agent or officer of the United States who acts beyond his authority is answerable for his actions."[26] Further, by way of explanation respecting the character of the *Clark* case, this quotation from *Land v. Dollar* is most significant: ". . . public officials may become tort-feasors . . ."[27] and "[t]he dominant interest of the sovereign [when the case of the nature of Clark has been instituted] is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."[28]

Continuing to cite the *Clark* and *Hodel* cases—which are totally irrelevant in these proceedings—the Trustee quotes this excerpt from the *Clark* Decision.

> The Indian Claim Commission did rule that there had been a taking of all lands *lying outside of the boundary of the reservation.*[29] That boundary *is* the Wallace Survey Boundary.[30]

That last-quoted excerpt is diametrically opposed to the judgment in Docket 22-D. There, it is stated that ". . . *the Western Apache aboriginal title to lands outside of the White Mountain Apache Indian Reservation . . . was ex-*

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[25] *Ibid.*, p. 736.

[26] *Ibid.*

[27] *Ibid.*, p. 738.

[28] *Ibid.; See* also *Mine Safety Co. v. Forrestal*, 326 U.S. 371 (1945); *See* also Ex-parte New York, 256 U.S. 490, 500, 502 (1921).

[29] Brief in Opposition, p. 9.

[30] *Ibid.*

tinguished by the United States on May 1, 1873, without the payment of compensation.[31]

It is irresponsible for the Trustee to assert that the Wallace Survey Boundary could alter or change the Executive Orders of 1871 and 1872, both of which declared that the Northern Boundary of Petitioner Tribe's Reservation was and is "the south edge of the Black Mesa."[32]

Continuing to refer to the *Clark* and *Hodel* Decisions, the Trustee in its Brief in Opposition, again by way of footnote, declares that Petitioner Tribe had wrongly asserted that the United States cannot rely ". . . on the preclusive effects of the Ninth Circuit's judgment because the United States was not a party to that litigation." Thereafter, the United States Trustee declares—in error—that Petitioner Tribe sought to quiet title to lands that the United States owns. That statement is totally in error. The action, as emphasized above in *White Mountain Apache Tribe v. Clark,* did not involve lands owned by the United States.

It is then asserted contrary to fact that ". . . the United States was the real party in interest in that litigation [*White Mountain Apache Tribe v. Clark*]."[33] Thereafter and again contrary to fact, the Trustee asserts that the Tribe had ". . . a full and fair opportunity to litigate the title issue. . . ." That statement is again grossly in error. There was no conceivable means pursuant to which the Tribe could have a full and fair opportunity to litigate title to the 16,000 acres when it was proceeding against Secretary Clark as an individual acting beyond the scope of his official authority. Having made the unreasonable and totally erroneous statement, the Trustee concludes that the White Mountain Apache Tribe ". . . should be precluded from relitigating . . ." the title issue as it pertains to the 16,000 acres. Continuing in error, the Trustee cites the case of

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[31] Appendix 10, pgs. 87-a, 88-a.

[32] *See* above pages 1-2, para. 1-5.

[33] Brief in Opposition, p. 9-10, ftn. 8.

Montana v. United States.[34] The express language and rationale of the *Montana* Decision refutes and completely rejects the arguments presented here by the Trustee. That language is as follows:

> . . . A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a 'right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . *cannot be disputed in a subsequent suit between the same parties or their privies . . .*'[35]

Most assuredly, the United States was not a party to the case of *White Mountain Apache Tribe v. Clark*, nor was there anyone in the *Clark* litigation in privy with the United States.

The other cases cited by the Trustee, in addition to *Montana*, are inapplicable to these proceedings for precisely the same reasons as expressed above.[36]

In *Moore's* indepth analysis of "Effect of Participation in Litigation by Non-party"[37] there is reviewed and documented in detail the total futility of the Trustee's efforts to declare that the judgment in the *Clark* and *Hodel* cases would have a preclusive effect upon the claims of Petitioner Tribe that holds title to the 16,000 acres which lie within its Reservation. Petitioner Tribe claims that it could not be deprived of the 16,000 acres by the Trustee's erroneous survey.[38]

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[34] 440 U.S. 147, 153-154 (1979).

[35] *Ibid.* (Emphasis supplied).

[36] *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Laboratories Inc. v. United States of Illinois Foundation*, 402 U.S. 313, 328-329 (1971).

[37] Vol. 1B, *Moore's Federal Practice, Sec.* 0411[6], p. 111-246, *et seq.*

[38] Petition, p. 22.

As reviewed and fully documented above, neither the *Clark* or *Hodel* case has "resolved or subsumed" the issues which Petitioner Tribe requests this Court to hear.[39]

FAILURE OF THE TRUSTEE TO RESPOND TO TRIBE'S CHARGES THAT ALTHOUGH TRUSTEE WAS HELD LIABLE FOR ACCELERATED EROSION TRIBE WAS NOT AWARDED DAMAGES

As it has throughout its brief, the Trustee misstates the issues presented by Petitioner Tribe. With full documentation, Petitioner Tribe established the fact that the trial court found that ". . . the Government . . . must be held liable for the accelerated erosion. . . ."[40] No mention is made by the Trustee of the fact that the trial court had held the Government liable for the accelerated erosion. Mention is made that erosion had occurred and the carrying capacity of the rangeland had been reduced.[41] It is also stated, in total error, that "Petitioner claims only that the trial court awarded too little in damages as a factual matter."[42] It is then stated that the damages that were awarded included damages for erosion, citing Appendix 61a. It is to be observed that there is no reference on the cited appendix page to accelerated erosion, or the damages sustained by Petitioner Tribe from that accelerated erosion. The only reference made by the court in its final opinion is for ". . . mismanaging Tribe's range and forest resources."[43] Again no mention of accelerated erosion. As urged in Tribe's Petition, the accelerated erosion has "caused irreparable damage" to approximately 427,811 acres of land within Tribe's Reservation.[44]

Ignored likewise by the Trustee in its response is the fact that the agricultural products of the Indians have been

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[39] Petition, p. 12-13.

[40] Petition, p. 14.

[41] Brief in Opposition, p. 5, para. 2.

[42] *Ibid.*, p. 10-11.

[43] Appendix 4, p. 65a.

[44] Petition, p. 17.

reduced far over 50 percent due to the erosion which has destroyed "the agricultural lands along the streambeds. . . ."[45] Reference is also made to the findings by the trial court that the accelerated erosion by "gouging the streambeds to levels below many of the existing irrigation channels" depriving the Apaches of their systems of irrigation with the attendant loss of a substantial share of their food supply.[46]

The Court is requested to remand the issue of damages for accelerated erosion to the Court of Federal Claims requiring that Court specifically to assess the damages and to make an appropriate award to the Tribe commensurate with the losses it has sustained.

WHEREFORE, PETITIONER WHITE MOUNTAIN APACHE TRIBE renews its request as set forth in its petition for a writ of certiorari that the Court grant Petitioner Tribe its Constitutional right to judicial due process—its right to be heard relative to both its claim to title to the 16,000 acres and for damages commensurate with the losses it has sustained due to the ongoing accelerated erosion.

Respectfuly submitted,

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[45] *Ibid.*, p. 15.

[46] *Ibid.*,